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CITATIONS

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10321

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

v.

J. S. SONDOCK AND M. G. SONDOCK, INDIVIDUALLY AND AS PARTNERS DOING BUSINESS UNDER THE NAME OF MCCANE-SONDOCK DETECTIVE AGENCY, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HONORABLE THOMAS M. KENNERLY, JUDGE

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

STATEMENT

Nature of the case

This action was brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, to restrain appellees from violating certain provisions of the Act. The court below entered judgment denying the relief sought and from that judgment the Admin-

istrator has taken this appeal. The opinion below is reported in 43 F. Supp. 339, and appears at pages 220–236 of the printed record.[1]

STATUTE INVOLVED

A copy of the Act is attached as an appendix to this brief. The pertinent provisions are Sections 3 (b), 3 (j), 6, 7, 11 (c), 13 (a) (2), 15 (a) (2), 15 (a) (5), and 17.

PROCEEDINGS BELOW

On June 6, 1941, the Administrator filed his complaint (R. 6–11) against appellees alleging that many of their employees were engaged in interstate commerce and in the production of goods for commerce insofar as they watched, guarded and protected factories, warehouses and other establishments at which transactions in commerce and production for commerce were carried on. The complaint alleged further that appellees had failed to abide by the minimum wage requirements of Section 6, the maximum hour provisions of Section 7, and the record-keeping provisions of Section 11 (c) and prayed for an injunction restraining appellees from violations of Sections 15 (a) (2) and 15 (a) (5) of the Act.

Appellees' answer and amended answer (R. 24–28, 28–33), filed June 27 and November 3, 1941, respectively, conceded noncompliance with the wage, hour, and record-keeping provisions but denied the applicability of the Act to their employees' work. The answer also asserted, as an affirmative defense, that appellees' busi-

[1] References to the printed record on appeal are indicated by the symbol (R.)

ness constituted a "service establishment" within the exemption from Sections 6 and 7 provided by Section 13 (a) (2).

Appellees, operating as a partnership under the name of McCane-Sondock Detective Agency, employ approximately 34 night watchmen in and about Houston, Texas, to guard the premises of appellees' customers pursuant to contracts calling for prescribed protection. Some employees are assigned to guard industrial and commercial plants, warehouses, factories, and other establishments engaged in the production of goods for commerce or in interstate commerce, while others are detailed to watch private residences and retail and service establishments.[2] All watchmen are carried on appellees' pay roll and are employed by them, but work at the customers' establishments. The owners of the guarded premises pay appellees an agreed price for the work done by the watchmen.

The employees involved on this appeal fall into two categories: those whose work requires them to make regular rounds or beats throughout the night guarding a number and diversity of business establishments, and those assigned to guard exclusively the manufacturing establishment or plant of a single customer. Typical of employees in the first group is H. C. Holman, employed on appellees' beat 27 (R. 39, 56–62). This employee makes regular rounds of the establishments of 22 customers, of which five are factories producing

[2] This appeal does not involve employees in the latter category or those employees irregularly or occasionally employed by appellees for special assignments as private detectives or guards.

goods for interstate commerce, and eight are wholesale distributors of goods received in large part from other States and distributed within Texas and in substantial quantities directly into other States (R. 56–62). This employee also guards the establishments of an industrial welder and of a concern engaged in the transportation of heavy machinery used in the production of oil for interstate commerce.

Employees making regular nightly rounds carry watchmen's clocks into which, at each place guarded, they insert numbered keys which are located at points in and about the customer's place of business (R. 187–188). These keys are so located as to require the watchman to cover the entirety of the customer's plant, thereby insuring the maximum protection against fire, theft, and other hazards of the night (R. 126, 175, 189–190). The group of watchmen who devote their time exclusively to the protection of plants of individual customers perform similar functions except that their continuous presence throughout the night is required in and about the factory, warehouse, or other place of business in which they work (R. 40–47, 97, 99, 105, 123, 125, 133, 140, 164).

Although appellees maintain an office in Houston, none of these employees performs any functions there, since they do all their work at the customers' establishments (R. 35, 133). Most of the men stop at the office in the evening merely for the purpose of having changed the nightly recording sheet or paper dial in their watchmen's clocks (R. 151, 213); others report to the office only for their biweekly pay checks (R. 127, 136).

Appellees maintain stations at three points in the city from which their watchmen may call in to the office (R. 212). This, together with the fact that a number of the beats laid out for the men intersect (R. 200), enables appellees to be reasonably certain that their employees are performing their required duties at their customers' places of business.

Although technically under the direction of appellees, the watchmen are actually supervised, in many instances, by appellees' customers. Watchmen whose work is unsatisfactory to the customer are replaced upon request (R. 122, 216) and in one instance the watchman's wages and hours were prescribed by the customer (R. 216). All of appellees' customers find the employment of watchmen necessary to the proper operation of their businesses. Many, before entering into contract with appellees, employed men on their own pay rolls to perform the same tasks (R. 100, 122, 163–165). In several instances the same watchmen who are now on appellees' pay roll were formely employed for the same work by the manufacturers and distributors whose plants they continue to guard (R. 101, 122, 163–165). Sometimes appellees hire the customer's former watchman at the suggestion and upon the recommendation of the customer (R. 122). Other businesses, after discontinuing their contracts with appellees, have undertaken to re-employ watchmen (R. 91–92, 105–106) and frequently hire the man previously furnished by appellees (R. 91–92, 138–139, 163–165).

The watchmen guard raw, semi-finished and finished products being produced for commerce or awaiting

shipment in interstate commerce (R. 92–93, 97, 134); they protect the plants and premises of their employers' customers from marauders and thieves and guard against fires (R. 126, 175, 189–190). The premises protected include open areas in which materials are stored and which have no other protection (R. 93, 97, 124), as well as railroad sidings by means of which goods are received from out-of-State sources and shipped to extrastate destinations (R. 92, 99, 104, 121).

Appellees' customers include several scrap metal dealers who break the scrap into convenient form for shipment to extrastate points by rail and water (R. 41, 43–46, 67, 95, 96, 99); plants engaged in the reclaiming of rubber and the retreading of tires (R. 55, 58) shipped to out-of-State points; manufacturers of electrical equipment (R. 63, 72); producers of paint and varnish (R. 119); printers and lithographers (R. 54, 65, 68, 114); concerns manufacturing creosoted timber products (R. 106) and oil well equipment (R. 70, 71, 74); and canners of food products (R. 49, 54, 56), all of whom ship their products in interstate commerce. Also included are manufacturers of tanks and barrels in which petroleum products are shipped from Texas to other States (R. 60, 72) as well as processors of ingredients of building materials which leave Texas (R. 52, 59).

Apart from these and others producing goods for commerce, plants guarded by appellees' employees are also engaged in commerce in distributing to points outside Texas steel products (R. 58, 60, 89), food products

and groceries (R. 51, 57, 63), construction equipment and oil field supplies (R. 41, 44, 56, 70, 71, 73, 74), food products (R. 50), tires, other rubber products and automotive accessories (R. 57, 64, 66), mechanical and marine equipment (R. 53, 73, 67), and other goods (R. 59, 60, 64, 69, 73), originating both in Texas and other States.

The District Court denied the Administrator's prayer for an injunction, holding that "defendants are a service establishment, and defendants' employees or watchmen are engaged in a service establishment" within the exemption from Sections 6 and 7 provided by Section 13 (a) (2) (R. 235–236). Because of its ruling on this issue, the District Court found it unnecessary to decide whether the watchmen are engaged in "production for commerce" within the meaning of Sections 6 and 7 of the Act (R. 234).

QUESTIONS PRESENTED

1. Whether watchmen employed by a maintenance supply company to guard factories, plants, warehouses, and other establishments producing goods for interstate commerce or distributing goods in commerce are themselves engaged in commerce or the production of goods therefor.

2. Whether a maintenance supply company which assigns watchmen to guard places of business at which transactions in commerce or production for commerce are carried on is a "service establishment" within the meaning of Section 13 (a) (2) of the Act.

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SPECIFICATION OF ERRORS

The District Court erred:

1. In entering judgment for appellees.

2. In failing to issue an injunction as prayed in the complaint.

3. In concluding that appellees' failure to pay their employees wages at the rates required by Sections 6 and 7 of the Act did not violate the Act.

4. In failing to hold that appellees' employees engaged in guarding factories, warehouses, and other establishments engaged in commerce or the production of goods for commerce were themselves so engaged.

5. In holding that appellees' employees were engaged in a service establishment and exempt from the Act under Section 13 (a) (2).

ARGUMENT

I

Appellees' employees guarding plants engaged in the production of goods for commerce or in the distribution of goods in commerce are within the scope of the Act

A substantial number of the establishments watched and protected by appellees' employees produce goods for commerce or engage in transactions "in commerce." Among these are factories at which goods are manufactured for direct extrastate shipment, plants of metal dealers who process scrap for shipment directly into other States or indirectly to local dealers for subsequent interstate shipping, plants making ingredients of other products which move in interstate commerce, manufac-

turers of drums and tanks used for the interstate shipment of oil, and warehouses of wholesale distributors who receive goods from extrastate points and ship substantial quantities of merchandise to extrastate destinations. Plainly, the employees of these manufacturers and processors are engaged in "production for commerce" (*United States* v. *Darby,* 312 U. S. 100; *Enterprise Box Co.* v. *Fleming,* 125 F. (2d) 897 (C. C. A. 5), certiorari denied, 62 Sup. Ct. 1312 (1942); *Hamlet Ice Co.* v. *Fleming,* 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 5 Wage Hour Rept. 826 (Sup. Ct. 1942), and the employees of the wholesalers are engaged "in commerce." *Fleming* v. *Jacksonville Paper Co.,* 128 F. (2d) 395 (C. C. A. 5), certiorari granted, No. 336, October 19, 1942; *Walling* v. *Goldblatt Bros.,* 128 F. (2d) 778 (C. C. A. 7), petition for certiorari pending, No. 418, October Term, 1942. It is equally plain that watchmen and other maintenance workers employed directly by companies producing for commerce or engaged in commerce are within the coverage of the Act. *Hamlet Ice, Jacksonville Paper,* and *Goldblatt* cases, all *supra; Bowie* v. *Gonzalez,* 117 F. (2d) 11 (C. C. A. 1); *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. (2d) 655 (C. C. A. 10); *Johnson* v. *Phillips-Buttorff Mfg. Co.,* 160 S. W. (2d) 893 (Tenn. 1942), certiorari denied, 5 Wage Hour Rept. 826 (Sup. Ct. 1942); *Fleming* v. *American Stores Co.,* 42 F. Supp. 511 (E. D. Pa.), pending on appeal to the Third Circuit.

The only question here is whether maintenance employees who would undoubtedly be within the scope of the Act if employed directly by companies engaged "in" or "production for commerce" are to be denied the benefits of the statute because their work is supplied to

such companies through the medium of an independent agency. Although the District Court failed to pass on this question (R. 234), the pertinent authorities require a negative answer. The application of Sections 6 and 7 turns exclusively upon the nature of the work performed by the individual employee without regard to the character of the employer's business. Indeed, "to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged." *Kirschbaum* v. *Walling,* 62 Sup. Ct. 1116, 1120 (1942), applying the Act to watchmen and other maintenance employees of the owner of a loft building occupied by manufacturers producing goods for commerce. Nor may appellees avoid the controlling force of the *Kirschbaum* case by pointing to the fact that their office, unlike that of the loft building owner in the *Kirschbaum* case, *supra,* is situated in a different building from the establishments guarded and protected by the watchmen. *Holland* v. *Amoskeag Mach. Co.,* 44 F. Supp. 884 (N. H.). Precisely because appellees' business differs in no significant respect from that of the Kirschbaum Company, other courts passing on the application of the Act to a maintenance supply company have decided the question in favor of coverage. *Lorenzetti* v. *American Trust Co.,* 45 F. Supp. 128 (N. D. Calif.), pending on appeal to the Ninth Circuit; *Haley* v. *Central Watch Service,* 5 Wage Hour Rept. 822 (N. D. Ill 1942).[3] A like conclusion is required here.

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[3] *Bowman* v. *Pace Co.,* 119 F. (2d) 858, decided by this Court, is not to the contrary; it holds narrowly that a watchman assigned by a maintenance supply company to guard the establishment of

II

Appellees' employees are not engaged in a service establishment within the meaning of Section 13 (a) (2) of the Act

Section 13 (a) (2) exempts from the wage and hour provisions of the Act "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The District Court held that appellees operate a "service establishment" and that their employees, although working at factories, warehouses, scrap metal plants, and similar establishments, work "in" the service establishment assertedly operated by appellees. We submit that appellees have failed to carry the burden, incumbent upon all who rely on an exemption carved from the provisions of a remedial statute, of showing that their operations fall "within the words as well as within the reason" for the exemption. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1). Appellees cannot prevail in their contention because they fail to meet

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a company producing goods for commerce may not maintain a suit under the Act against the company guarded because of the absence of the requisite employer-employee relationship between the parties. And *Schrieber* v. *Kane Service*, N. D. Ill., referred to by the court below (R. 234), was never decided. On defendant's motion to dismiss the complaint, Judge Holly had prepared an informal memorandum which was erroneously published as the opinion of the court in 3 Wage Hour Rept. 459. Subsequently the court denied the motion and set the case for trial. The case has not yet been tried. 4 Wage Hour Rept. 15 carries a correction of the previous publication. In the light of the *Haley* case *supra*, also decided by Judge Holly, but after the Supreme Court's opinion in the *Kirschbaum* case, *supra*, it is plain that the *Schrieber* case is without any force as a precedent.

the two conditions imposed by Section 13 (a) (2): (1) the establishment, if any, which appellees' business constitutes does not provide "service" within the intendment of the exemption; and (2) appellees' employees are not "engaged in" the asserted establishment.

Section 13 (a) (2) was not intended to exempt as "service establishments" businesses, such as appellees', engaged in supplying necessary employees to plants, factories, warehouses, and other concerns engaged in covered activities. Rather, the exemption was designed to exclude only local retailers and such analogous establishments as barber shops, beauty parlors, laundries, and service stations which also cater to the ultimate consumer but differ from retail establishments only in that they sell services rather than tangible goods. *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed, 62 Sup. Ct. 1116 (1942). In framing the statute these two classes presented an identical problem and a common solution was reached as to each The terms "retail" and "service" are used together in the same sentence and the same requirement as to interstate commerce is made applicable to each. The legislative history makes it apparent that Congress intended by the use of the term "service" to exclude no new or wholly unrelated segment of the business community.

While the original bills contained no exemption for either retail or service establishments (H. R. 7200, S. 2475, 75th Cong., 1st sess. May 24, 1937), the committee hearings and debates reflect acute congressional concern about the application of the Act to small retailers and similar businesses. See Joint Hearings on

S. 2475 and H. R. 7200, 75th Cong., 1st sess. (1937) pp. 35–37; 83 Cong. Rec.7436–7438 (1938). As passed by the Senate, the bill merely exempted persons employed in a "local retailing capacity."[4] The House provided a further exemption for "any *retail industry* the greater part of whose selling is in intrastate commerce."[5] (Emphasis supplied.) This provision was changed by the Conference Committee to apply on an "establishment" rather than an "industry" basis and was, in addition, extended to include "service" establishments.[6] This was the form in which the exemption was enacted as Section 13 (a) (2). Although neither the Conference Committee report nor the debates in either house sheds light on the reason for this extension, it is a rational inference that the Committee desired to make clear that the exemption covered not only the local grocery store but the neighboring valet establishment as well. Without the addition of "service" establishments, there would have been considerable doubt as to whether the language employed included establishments selling intangible services rather than tangible goods. Had the insertion of the express provision for "service" establishments been intended to have any more far-reaching effect, it seems reasonable that an explanation of the change would have been forthcoming. The fact that no one challenged the addition indicates a rather uniform understanding that there was no intent to extend the exemption to include any unrelated group of establishments.

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[4] S. 2475, passed by the Senate July 31, 1937, Section 2 (a) (7).

[5] S. 2475, passed by the House May 24, 1938, Section 6 (c).

[6] H. Rept. 2738, 75th Cong., 3d sess. (1938), pp. 9, 32.

Appellees possess none of the characteristics distinguishing establishments exempted under Section 13 (a) (2). The interpretation of "service establishments" followed by the District Court nullifies the intent of Congress, destroys the legislative coherence of the exemption, and leads to confusion and uncertainty as to its scope. "Service" standing alone is indefinite. In a sense every business renders services. If "service establishment" is not read in connection with "retail establishment," the applicability of the exemption will depend upon the almost innumerable connotations of the vague term "service." The exemption would become a controversial issue in many types of cases—e. g., banks, telephone and telegraph companies, airlines, newspapers, trolley lines, railroads, motor carriers, employment agencies, warehouses of various types, and many others. But Section 13 (a) (2) was not intended so to apply. The statute provides other express exemptions for seasonal industries, stockyards handling livestock, establishments engaged in ginning and compressing cotton for farmers, carriers by air, certain small newspapers, interurban railways, local trolley and bus lines, warehouses handling, packing and storing agricultural commodities, small telephone exchanges, motor carriers and railroads.[7] Under the theory apparently followed by the District Court, these express exemptions are superfluous since each of the enterprises mentioned would be encompassed within the terms of Section 13 (a) (2). Stat-

[7] See Sections 7 (b) (3), 7 (c), 13 (a) (4), (8), (9), (10), (11), 13 (b) (1) and (2).

utes are not to be so capriciously interpreted. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 393.

Moreover, the issue is foreclosed adversely to appellees by *Kirschbaum* v. *Walling*, 62 Sup. Ct. 1116 (1942) decided subsequent to the District Court's opinion, which denied the exemption to the owner of a loft building who supplied maintenance facilities to the manufacturers occupying the building. There are no significant differences between the *Kirschbaum* case and that at bar and denial of the exemption in the former impels a like result here. To the same effect see *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.), pending on appeal to the Ninth Circuit; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.). Cf. *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Fleming* v. *Lincoln Loose Leaf Warehouse Co.*, 5 Wage Hour Rept. 615 (E. D. Tenn. 1942); *Boylan* v. *Liden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co. 1941); *Mill* v. *United States Credit Bureau*, 5 Wage Hour Rept. 114 (S. D. Calif. 1941); *Yunker* v. *Abbye Employment Agency*, 32 N. Y. S. (2d) 715 (Munic. Ct. N. Y. City 1942).

The exemption is unavailable to appellees on another ground: the employees involved on this appeal are not "engaged in" the establishment, if any, operated by appellees because they perform all their work and are, therefore, necessarily "engaged in" the factories, plants, warehouses, and other business establishments which they guard. "Establishment" as used in Sec-

tion 13 (a) (2) connotes a physical place of business[8] (*Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.), pending on appeal to the Third Circuit; cf. *Barfoot* v. *White Star Line*, 170 Mich. 349, 136 N. W. 437 (1912); *Bubb* v. *Missouri K. & T. R. R. Co.*, 89 Kans. 303, 131 Pac. 575 (1913); *Truman* v. *Kansas City M. & O. R. R. Co.*, 98 Kans. 761, 161 Pac. 587 (1916)) and the phrase "engaged in" has meaning only when considered in its frame of reference—the physical "establishment." And so holding is *Lorenzetti* v. *American Trust Co., supra.* In denying the exemption to a maintenance supply company which furnished to a bank engaged in commerce, watchmen and other maintenance employees who worked in and about the space occupied by the bank, the court stated (45 F. Supp. at 138):

> The phraseology used is significant. The words "engaged in any * * * service establishment" are not synonymous with "employed by any service business." The word "establishment" is defined as "the place where one is permanently fixed for residence or business * * * also any office or place of business with its fixtures." Webster's New International Dictionary, 1931 Ed. The janitors were employed by

[8] As noted *supra*, page 13, the House version exempted "any *retail industry* the greater part of whose selling is in intrastate commerce." (Emphasis supplied.) The rejection of this language in conference in favor of "retail establishment" is cogent evidence that Congress intended to restrict application of the exemption to physical places of business rather than to business enterprises as such.

the Building Company, but the establishments in which they were engaged were the banking establishments.

One other consideration merits comment. Many of appellees' employees formerly were employed by the manufacturers and distributors whose plants and premises they now guard. They performed the same duties then as now. When employed directly by the manufacturers and distributors, they were not engaged in a "service establishment." The transfer to another pay roll has not altered the characteristics of the establishments in which they still work. Yet unless reversed, the decision below will permit simple evasion of the Act "by the interposition of an independent contractor between the laborer and the interstate business receiving the benefit of his services." *Lorenzetti* v. *American Trust Co., supra,* at page 139. While we do not urge that appellees and their patrons have engaged in illegal evasion,[9] the construction of Section 13 (a) (2) advanced by appellees will, if sanctioned by this Court, throw wide the door for undesirable practices. The possibility of evasion through the independent contractor device, particularly with respect to custodial employees whose routine duties ordinarily do not require careful supervision, is not lightly to be dismissed. Normal economic compulsions will do much to persuade employers, who now hire their own watch, custodial, and other maintenance employees, to effect savings

[9] While the contracts were bona fide, they were concededly motivated, at least on the part of the customers, by a desire to save labor costs. Appellees' claim of exemption from the Act was one of their main selling points (R. 119–120).

in labor costs by causing the transfer of such employees to the pay rolls of maintenance supply companies. Although employment by independent contractors may be legal and at times necessary, an employee's rights under a statute geared to economic function may not be made to depend upon the fortuity of his being employed by a contractor rather than by the manufacturer to whose productive operations he is necessary.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to issue an injunction as prayed in the complaint.

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